United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1551

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Employees Union Pension Fund, a pension trust fund,

Plaintiffs-Appellees-Appellants,

—against—

KRAFTCO CORPORATION,

Defendant-Appellant-Appellee.

BRIEF OF APPELLANT KRAFTCO CORPORATION

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Plaintiffs-Appellees-Appellants,

—against—

Kraftco Corporation,

Defendant-Appellant-Appellee.

BRIEF OF APPELLANT KRAFTCO CORPORATION

Preliminary Statement

This is an appeal by defendant Kraftco Corporation ("Kraftco") from a money judgment entered in the United States District Court for the Southern District of New

York on February 22, 1974 upon the Opinion and Order of Circuit Judge Lumbard (sitting by designation) dated February 19, 1974, rendered after a trial without jury (F.Supp), and from Judge Lumbard's order of March 28, 1974 which denied, without opinion, Kraftco's motion dated March 4, 1974 for amendment of the judgment or for a new trial.

On their cross-appeal plaintiffs claim that the judgment did not grant them all the monetary relief to which they were entitled.*

In connection with the planned closing of one of Kraftco's metropolitan area ice cream plants, the two plaintiff unions and Kraftco entered into a written agreement in which, among other things, Kraftco agreed to pay to the metropolitan area ice cream industry pension fund the amount which an "actuarial study" by the fund's actuarial consultants would show to have been the "impact" of the closing upon the fund.

The language of the agreement was ambiguous, and the approach which the actuarial consultants took to its meaning led to a type of "actuarial study" which showed an "impact" of $978,100. Kraftco contended that they had misinterpreted the agreement and that the study made was not the study intended. This action by the unions and the union designated trustees of the pension fund followed Kraftco's refusal to pay the $978,100. Plaintiffs moved for summary judgment, but Judge Tyler agreed with Kraftco that the relevant contract language was ambiguous and that the actuarial study performed was not what the

* The parties have stipulated pursuant to F.R.A.P. 28(h) that Kraftco will be the appellant for all purposes on this appeal. The individual defendants named in the complaint were nominal parties who did not participate in the trial and will not participate on this appeal (219a, fn. 1).

parties intended, and he ordered a redetermination by the actuarial consultants (323 F.Supp. 358). This Court dismissed plaintiffs' appeal from Judge Tyler's order, holding that the order was not a final decision (427 F.2d 933).

On the redetermination which Judge Tyler ordered, the actuarial consultants described two other possible interpretations of the ambiguous language of the agreement and performed the related actuarial studies. The interpretation supported by Kraftco ("the Kraftco interpretation") led to a $134,100 amount; the other ("the alternate interpretation") led to a $576,700 amount.

At the trial, plaintiffs contended they were entitled to either $978,100 because Judge Tyler had been wrong, or $576,700 because the actuarial consultants preferred the alternate interpretation to the Kraftco interpretation. Kraftco's position was that the objective and subjective evidence of the parties' intent showed that the Kraftco interpretation was correct and that it would pay the $134,100 to the fund in any event, and that if the plaintiffs failed to resolve the ambiguity and prove that the agreement constituted a meeting of the minds of the parties, they were not entitled to anything more than Kraftco was willing to pay.

Judge Lumbard found that Judge Tyler was correct in ruling out the $978,100 interpretation but that the alternate or $576,700 interpretation was the one intended. He also denied Kraftco a hearing on its contention that, even assuming that the parties' intent had been as found, the actuarial consultants had erred in respects not involving any actuarial expertise.

Issues Presented for Review

Kraftco's appeal raises the following questions:

1. Where it has been found that there are three possible approaches to the meaning of an ambiguous written agreement, the first of which can quickly be eliminated, and plaintiffs present no evidence to show which of the two remaining approaches was intended, did the court commit clear error when it found in the uncontested evidence submitted by defendant in support of the second approach an allegedly sufficient basis for inferring that the third approach was actually intended?

> The actuary who made the redetermination preferred the alternate interpretation to the Kraftco interpretation, but not on actuarial grounds. In the words of Judge Lumbard, the actuary really concluded that the "agreement remained susceptible of multiple interpretations and that he was unable to select the one which, as a matter of actuarial practice, conformed to the intent of the parties" (223a). Judge Lumbard held that the three interpretations were the only possibilities and that it was for the court to determine on the basis of evidence extraneous to the agreement which one the parties intended (230a).
>
> Judge Lumbard's reasoning in support of the alternate approach was ultimately based upon a faulty analysis of evidence offered by Kraftco: (a) "Above all" (241a), he rested his decision upon an inference (not drawn by the parties) from an alleged distinction (which did not really exist) between the situation in suit and an earlier situation cited by Kraftco (and resisted by plaintiffs) as relevant precedent. (b) He found his result confirmed by an allegedly pertinent dollar amount that appeared in an actuarial exhibit

offered by Kratfco; but the exhibit, which he had refused to receive in evidence, conclusively proved that Kraftco did not intend the alternate approach, and the dollar figure cited from the document was not pertinent. (c) He relied upon the alleged fact that it was Kraftco's expert "who had suggested the alternate approach later used by [the actuary]" (240a, fn; 243a-245a); but the alternate approach had been employed by the fund's actuarial consultants to analyze another plant closing *at the same time* that they made their original study of the Kraftco closing, and Kraftco's expert testified, without contradiction, that the alternate approach was precluded, and the Kraftco approach compelled, by uncontested, contemporaneous evidence of a communication between the parties with respect to what the agreement meant.

2. Where in an action on an agreement which provides for a determination by an expert, the court directs that the making of the determination be attended by the formalities which normally accompany an arbitration under state law, and where state law provides that a party may, on stated grounds, apply to the arbitrator or the court for modification of an arbitrator's award, and where after the determination one of the parties makes a timely application on such grounds, does the court err if it refuses to hear such an application? Independently of state law, does the court err in not hearing objections to an expert's determination which are based upon matters outside his field of expertise?

New York law (CPLR, Section 7509) permits modification of arbitrators' awards. Judge Tyler held that the court had the power to consider whether the actuarial consultants had followed the correct formula (92a-93a) and to review his determination for reason-

able correctness (89a). The points raised by Kraftco's application to modify the redetermination of the actuarial consultants were such that they should have been heard by Judge Lumbard.

Plaintiffs' cross-appeal raises the following question:

1. Where an agreement provides that a corporate actuarial consulting firm will perform an actuarial study with respect to the "impact" of an event upon a pension fund, and that the firm's determination shall be "final and binding", does the agreement confer upon the corporate actuarial consultants the authority not only to decide actuarial matters, but also the authority to resolve ambiguities in the language of the agreement which the consulting firm itself admits cannot be resolved by actuarial science?

Judge Tyler rejected this contention (93a). Judge Lumbard followed Judge Tyler's holding, not simply as a matter of law of the case, but because he was convinced on the evidence that it was correct (229a-230a). Their decisions should be affirmed.

Statement of the Case

On April 25, 1968, Kraftco and the plaintiff Unions entered into an agreement with respect to the closing of Kraftco's Breyer Ice Cream plant in Newark, New Jersey ("the Breyer Agreement"). As thereafter reduced to writing, it provided, in part:

> 3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund.

> If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties. (a)

The ultimate issue which the evidence at trial posed was the contractual intent of the parties to the Breyer Agreement. The evidence showed that there were three possible interpretations of the pertinent language of the Breyer Agreement leading to three different actuarial studies, the one originally performed by the actuarial consultants, the one argued for by Kraftco and an alternate approach subsequently supported by the actuarial consultants.

The choice among the three was presented for decision on a record free of conflict. Judge Lumbard did not have to decide any contested issues of facts; the plaintiffs submitted only documentary evidence; the credibility of Kraftco's witnesses was not challenged; its documentary evidence, like plaintiffs', was of unquestioned authenticity.

The evidence showed that the Breyer Agreement developed out of the following facts and circumstances.

A. Kraftco's Plan to Close Its Breyer-Newark Plant

Prior to the spring of 1968, Kraftco, which was then known as National Dairy Products Corporation, operated two ice cream plants in the New York metropolitan area through its Breyer Ice Cream Company ("Breyer"). One plant was in Long Island City, New York, and the other in Newark, New Jersey.

Breyer had been part of Kraftco since prior to April 1, 1952 and, in more recent years, it had been operated as a

unit within the Sealtest Division of Krafto ("Sealtest"). The hourly production and distribution employees of the Breyer-Newark plant had at all relevant times been represented for collective bargaining purposes by the Milk Drivers and Dairy Employees Union Local 680 ("Local 680"), a Teamster affiliate, and the Long Island City employees by the Ice Cream Drivers and Employees Union Local 757, also a Teamster affiliate ("Local 757").

Prior to January 1968, Kraftco had concluded that the Newark facility should be closed. It was a small plant—2 million gallons per year as against 10-15 million gallons at Long Island City—and was not operating profitably. (176a-177a) But Kraftco did not want to lose its market for Breyer Ice Cream in northern New Jersey:

> The objective of the company was to discontinue the production of ice cream at the Newark plant, to move that production into the large facility in Long Island; to bring the ice cream from Long Island to a distribution facility in Newark and to distribute that ice cream through the same Local 680 employees in the area in which it had previously been distributed, and to achieve that at a cost which would make it economically feasible to the company. (177a)

Section 2(e) of the collective bargaining agreement between Breyer-Newark and Local 680 provided as follows (270a-271a):

> (e) The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 680 and to continue to manufacture within the area of Local 680, and the Company, including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local

680 area for sale or distribution of such products in the Metropolitan Area; however, nothing herein shall restrict a company which formerly manufactured under contract with Local 757 or 680 from resuming such manufacturing under contract with said Local for distribution in its area.

The area of Local 680 shall be the Counties of Union, Essex, Bergen, Hudson, Passaic, Middlesex, Ocean, Somerset, Morris, Monmouth, Hunterdon, Sussex, and Warren, in the State of New Jersey.*

To whatever extent this provision limited the rights Kraftco would otherwise have had, it was clear that it imposed such limitations only "during the term of this Agreement", and the agreement was to expire at midnight on April 30, 1968 (264a).

Accordingly, on January 24, 1968, Mr. V. L. Ashenbrenner, a Vice President of Sealtest wrote to Lawrence McGinley, the then President of Local 680 (and an original plaintiff herein), to advise him of Kraftco's "intention to discontinue production at our [Newark] facility . . . on May 1, 1968" and to indicate a willingness "to discuss the problems incidental to the discontinuance of production" (331a-332a). Local 680 took the position that it would not discuss the matter until the existing contract expired (198a).

Kraftco consulted Irving R. Segal, Esq., of the Philadelphia firm of Schnader, Harrison, Lewis & Segal, in connection with this matter; in fact, he had worked on the January 24, 1968 letter with Mr. Ashenbrenner (174a). On March 14, 1968, since nothing had been heard from

* The comparable provision in the Local 757 contract with Long Island City defined its area to include New York City, Nassau and Suffolk. The two areas together comprised the New York metropolitan area as the parties used that term.

Local 680, a meeting was held at Kraftco about the problem among Messrs. Segal, Ashenbrenner, David Campbell (Sealtest's Personnel Director), Donald E. Mott (Breyer's Personnel Director) and others (174a-175a). One object of the meeting was to decide upon ways and means to get Local 680 to enter into serious discussions. Hopes for an orderly termination of Newark production and transfer of the distribution could easily have been wrecked—with harm to employer and employees alike—if Local 680 could not be induced to sit down and bargain about the matter. It was decided to send Mr. Segal as an emissary to Local 680's lawyer, Tom Parsonnet, Esq., for the particular reason that Mr. Segal, on behalf of another client, Swift & Company, had dealt with Mr. Parsonnet and Mr. McGinley in the recent past in connection with an analogous problem involving the closing of a Swift & Company ice cream plant. (177a-178a)

Before approaching Mr. Parsonnet, Mr. Segal tried to anticipate what the union's concerns would be and informed himself with regard to what Kraftco was generally willing to do to obtain the union's cooperation and what it would do if its cooperation could not be obtained. He correctly anticipated that special severance pay and some provision for the industry pension plan would be the subjects of concern to Local 680. (180a-183a)

An understanding of the Parsonnet-Segal discussion, which took place on April 11, 1968, requires an understanding of the pension plan and an earlier Swift & Company matter.

B. The New York Ice Cream Industry Pension Fund

The collective bargaining agreement between Kraftco and Local 680 was identical in all material respects to the agreement between Kraftco and Local 757 covering the

Long Island City employees. Both agreements were part of a matrix of substantially identical collective bargaining agreements between Locals 680 and 757 and the 49 ice cream companies which together constituted the New York metropolitan area ice cream industry ("the Industry") (41a-42a, 56a-58a). This basic form of collective bargaining agreement as amended from time to time was known as the "Industry Agreement".

Industry Agreements between Locals 680 and 757 and the employers whose employees they represented were continuously in effect since prior to April 1, 1952 (56a-57a) when the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Trust Fund ("the Pension Fund") was created pursuant to a written Agreement and Declaration of Trust ("the Trust Agreement") (194a)*. Originally and at all relevant times since, the assets of the Pension Fund have consisted of contributions (and income thereon) paid by the employers in respect of hours worked by their employees pursuant to successive Industry Agreements (57a).

This Industry-wide system pooled the actuarial experience of the employees of each employer. As Judge Lumbard found, this meant that:

> No account was taken of the age and service characteristics or the withdrawal, death, and retirement rates of the employees of each individual employer. Similarly, no effort was made to determine whether the actuarial relationship between the overall contribution rate for the plan and its overall benefit level also

* Another union, Local 338, originally participated in the Industry pension arrangement with Locals 680 and 757 (94a). There is no indication as to when it withdrew. Judge Lumbard said that Kraftco (Breyer) did not join the Pension Fund until 1958 (226a). This is not correct; Breyer-Newark was a charter member of the Pension Fund (68a-69a).

> held for any particular employer. Consequently, even though all employers contributed the same amount per employee hour, some employers stood at a relative advantage to others in that their employees received benefits in greater proportion than the assumed normal benefit level of the Fund. It was the employers' decision, however, that these relative cost advantages to some should be overlooked in view of the overall cost savings in a multi-employer plan. Any employer dissatisfied with the arrangement was free to withdraw from the Fund at the next round of collective bargaining with the unions. (224a)

Although, as Judge Lumbard noted, each employer's obligation was limited to the payment of agreed contributions, the employers and the unions, directly in collective bargaining negotiations and indirectly through their representatives in the Pension Fund's Board of Trustees, concerned themselves with the level of pension benefits that could be established for given contribution levels. At all relevant times they were advised in such matters by the actuarial consultants to the Pension Fund, the Martin E. Segal Company ("the Segal Company").

The relationship between contributions and benefits for the Pension Fund was established on the basis of the "entry age normal cost" method which has been described by the Segal Company in these proceedings as follows:

> Under this method, there is calculated for each covered employee the level annual contribution required during his working lifetime in order to fund the benefits that might accrue with respect to his service. The sum of these amounts for all employees [in any year] [illegible] the [annual] normal cost of the plan. (107a-108a)

If, when a plan is established, years of prior service are not credited toward pension benefits, the regular payment of the annual normal cost will (if the underlying assumptions as to investment income, turnover, mortality and retirement prove correct) result in sufficient assets being on hand at all times to pay pensions and fully cover the liabilities accrued in respect of the service of employees not yet retired.

But if, when the plan is established, employees are given credit toward pension benefits for years of prior service (or if during the operation of the plan the participating employees are given prior service credit toward increased benefit levels) actuarial liabilities are thereby created (or increased) without any (or adequate) contributions having been made to the plan. In other words, the grant of credit toward pension benefits for years of service during which the full normal cost of such benefits was not paid creates an "unfunded" liability for such past service. This is what was done with the Pension Fund. (63a-65a)

The unfunded past service liability of a pension plan, since it is a present value, will grow each year. It will grow at the rate assumed and used for all plan asset and liability projections, the interest rate assumption, here 3%. Since it is "unfunded" its growth will not be offset by earnings on plan assets at the same assumed interest rate. Thus, at a minimum, interest must be paid to keep the unfunded liability from growing or, more conservatively, the liability may be funded (or amortized) by the creation of sufficient additional assets either through increased contributions or reduced benefit payments.

As stated by the Segal Company, "very early in the history" of the Pension Fund the employers and the unions decided to adopt an "interest-only approach" (109a) to the unfunded actuarial liabilities which its benefit policies had

created and were creating, that is, no portion of the employers' contributions would be allocated to amortization of the unfunded portion of the liability. As the Segal Company has stated:

> This meant that they would allow the portion of the past service liability that had not yet been funded to be continued as a perpetual debt, not to be amortized and not to be increased. In determining the annual cost of the plan (or of any proposed revision of the plan) at any valuation date, one of the elements of the cost would be an annual interest payment on the unfunded past service liability rather than an amortization payment to cover interest and part of the principal. (109a)

As of April 30, 1968, the Pension Fund had a liability to pensioners of approximately $8,600,000 against assets of about $10,400,000 and an unfunded liability of about $23,000,000. The annual normal cost was about $827,000 and interest (at 3%) on the unfunded accrued liability was about $690,000, for an annual actuarial cost of approximately $1,517,000. (340a-341a) With respect to this "interest only" policy, as Judge Lumbard found:

> This did not mean that the Fund was actuarially unsound, or that the contributing employers were current debtors in a legal sense. As long as current benefits payable to those actually on pension could be met out of current assets, the Fund was able to carry a large unfunded accrued liability on behalf of active employees without jeopardizing its solvency. (225a)

The Segal Company, in its report to the Trustees and evaluation of the Pension Fund as of April 30, 1968, explained it as follows:

> Such a funding system for a relatively young group such as yours will normally result in a fund on hand

at any point which will be equal to or greater than the liability for pensioners. However, if all employees who are currently eligible for regular and service pensions should retire immediately, the Fund's total reserves would not be sufficient to cover the lifetime liability for all pensioners then on the rolls. This does not mean that the Fund will not be able to meet its pension payments; it merely means that the Fund has insufficient funds on hand to guarantee lifetime pensions to those already retired if the Fund were to terminate. However, this appears to be a rather unlikely possibility. It is reasonable to believe that the Trustees can look forward to maintaining a fund at least as large as the liability for pensioners unless there is a radical change in the economics of the industry. (338a-339a)

The adoption by the parties to the Pension Fund—*i.e.*, the unions and Kraftco and the other employers—of this fundamental perspective toward the Pension Fund as an entity which would exist in perpetuity is important for the issue of contractual intent posed in this case. To be sure, as the Segal Company pointed out, if the economics of the Industry were to undergo a radical adverse change, the parties might have to change that perspective. But the question is whether Kraftco and the unions regarded the Newark closing as involving such a change for purposes of the actuarial study called for by the Breyer Agreement.*

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* This report of the Segal Company was dated May 8, 1969 (336a) and the enclosed Actuarial Valuation, signed by Jack M. Elkin, was dated April 15, 1969 (340a-342a). The record establishes that the original Segal Company study was completed on April 4, 1969 (25a). Therefore, it is clear that the Segal Company would be estopped from saying that the Breyer closing represented any radical change in the economics of the Industry.

C. The Earlier Swift Closing and Agreement

The Industry Agreement which preceded the one in effect during the time of the events in suit expired on April 30, 1965. Prior to that date Swift & Company operated ice cream plants in Brooklyn, New York under the jurisdiction of Local 757, and in Woodbridge, New Jersey under the jurisdiction of Local 680.

On April 30, 1965, upon the expiration of the predecessor Industry Agreement, Swift closed the Brooklyn plant (199a-200a). It does not appear that the closing was preceded by any negotiations between Swift and Local 757 (240a), but thereafter Local 757 claimed that Swift had residual obligations to the employees who had been terminated as a result of the Brooklyn closing and that there were limitations on Swift's right to do business in New York which survived the termination of the agreement and the closing of the plant.

When the plant closed, 13 displaced Brooklyn employees retired on pensions under the Industry system. An additional 51 employees were separated but were not eligible to retire. Of these, 8 obtained jobs at the Woodbridge, New Jersey plant.

These circumstances are evidenced by an agreement ("the Swift Agreement") which Swift, Local 757 and Local 680 entered into on April 21, 1966, almost a year after the closing (323a-326a). The Swift Agreement settled Local 757's alleged claims in respect of the terminated employees and eliminated "any doubt as to the Company's right to do business in New York or any other state". Swift, of course, wished to ship its Woodbridge ice cream into New York without union troubles.

The Swift Agreement provided that Swift would pay to the Pension Fund (1) $8,015.05 which was the amount

computed by the unions as equal to three years of pension contributions in respect of the 13 employees who had retired, (2) $23,227.13 which was recited to equal one year's contributions in respect of the 51 employees who had not been eligible to retire, and (3) $3,201.53 in respect of interest that would have been earned had the other sums been paid earlier (324a).

Under other provisions of the Swift Agreement, Swift agreed to offer employment at Woodbridge, New Jersey, to the 51 employees who had been laid off in Brooklyn a year before, such employment to be subject to the then effective terms of the collective bargaining agreement between Swift and Local 680. Such offers were to be mailed on April 28, 1966 and had to be accepted by the employee presenting himself for work at Woodbridge on or before May 28, 1966. Any employee who accepted the offer would have seniority at Woodbridge junior to any and all regular employees on the Woodbridge seniority list as of April 30, 1965, the day the Brooklyn employees were thrown out of work; in other words, they were placed at the foot of the seniority list in Woodbridge. (325a)

The Swift Agreement provided that any of the 51 employees who accepted the offer of employment at Woodbridge would only be guaranteed employment until January 14, 1967, a period of little more than eight months. After that time, they would work, or not, as a function of the level of business at Woodbridge and their seniority (326a).

As earlier indicated, Mr. Segal, Kraftco's counsel, acted for Swift and dealt with Mr. Parsonnet in the negotiation of this arrangement, and the Swift Agreement was ultimately signed by Mr. McGinley for Local 680 and by plaintiff Peter F. Clark on behalf of Local 757 (*id.*).

D. The Kraftco Actuarial Study

In anticipation of the unions' interest in obtaining a payment to the Pension Fund analogous to the payments made in the Swift situation, Kraftco sought actuarial advice with respect to the consequences of the closing upon the Pension Fund. Mr. Segal obtained results of an actuarial study by Peat, Marwick, Mitchell & Co. on April 5, 1968 (333a).

Focusing on the employees who would be displaced by the closing, this actuarial study calculated the present value of the contributions that would have been paid to the Pension Fund in respect of such employees if, instead of being laid off, they continued to work until their several normal retirement dates, and it compared this figure, which represented an estimated future revenue loss to the Pension Fund, with the saving to the Pension Fund that would result from the fact that such employees would be entitled to less in benefits from the Pension Fund upon their termination than they would be if they continued to work until normal retirement. The study estimated that the actuarial saving would be greater than the loss of anticipated contributions by about $108,000; in other words, the Pension Fund would be actuarially better off by virtue of the premature termination of this group of employees.

At this stage of the game an actuary could do no more than estimate the data. The relevant group of employees might change by the time of the closing since employees might leave before then in search of longer term opportunities. Also, benefit levels and contribution rates might change, as they did effective May 1, 1968.

In the end, this type of actuarial study, as ultimately performed by the Segal Company, showed an adverse effect of $134,100 (126a). The main determinants of the

$242,100 difference were that the Segal Company found an actuarial saving of only $192,000 (as against $368,000 by Peat, Marwick) and a present value of future contributions of $327,800 (as against $260,000). (Compare 126a and (333a).

Although Mr. Segal only referred to this study in his conversation with Mr. Parsonnet, he did not show it to him. Kraftco offered it in evidence as probative of its subjective intent with respect to the type of actuarial study which it thought would be pursued in response to the language ultimately used. The offer was rejected by Judge Lumbard (183a, 188a-189a, 192a-193a; Exhibit R, for identification 333a), but in his Opinion and Order he considered this document and, Kraftco submits, misconstrued it (242a).

E. The Segal-Parsonnet Meeting

In their meeting on April 11, 1968, Mr. Segal gave Mr. Parsonnet firm assurances that, if an amicable and economically feasible arrangement for the establishment of a new distribution center in New Jersey could not be worked out, Newark would be shut down completely; in other words, the threat of a closing was real and not a ploy to secure a more advantageous arrangement than presently existed.

Mr. Segal urged upon Mr. Parsonnet that the problem presented by Kraftco's proposal was analogous to the situation involving Swift & Company and Locals 680 and 757, and that it should be similarly handled (186a).

He told Mr. Parsonnet that the business served by the Newark plant was such that, if discontinued, it would not result in any increase of employment of Local 680 members by Breyer's New Jersey competitors, but that if a Breyer distribution center were established, Local 680 would have

the distribution center employees as members and, if marketing plans developed as hoped, total employment in the distribution center might make up any loss of production employees at Newark (185a-186a). Thus, Mr. Segal told Mr. Parsonnet that Kraftco was not looking upon the closing as necessarily involving a permanent loss to Local 680's membership base.

He broached with him in a preliminary way all of the subjects ultimately covered by the Breyer Agreement. The employees who would be laid off in Newark could be put at the foot of the Local 757 seniority list at the Long Island City plant (186a), where they would enjoy recall rights to any available job for at least one year (289a). He also said that the Company was prepared to be quite generous on severance pay (186a); and, with respect to the Pension Fund:

> "I said, 'We had made'—no, 'we had had made a preliminary investigation of the effect, if any, of the people who would be terminated, of their leaving the pension plan, the industry-wide pension plan, and we were convinced if anything it would be of benefit to the plan for these older employees with a lot of years of service to leave the plan, but if that should prove wrong and there were to be some effect on the pension plan we would of course be prepared to take care of that, but I did not think that would be a problem'." (186a-187a)

Asked again by Mr. Parsonnet about the Pension Fund:

> "I said, 'I told you already that I doubt very much, and you know, Tom, that these are older people. It can't have much effect, but if it turns out that it has some effect, it was worked out in Swift, we will work it out. I give you my assurance'." (187a-188a)

Thus Mr. Parsonnet knew that Kraftco had had a preliminary actuarial study done, that it focused on the people who would be affected by the closing and that, in Kraftco's mind, there was likely to be no adverse effect because these employees had many years of service.

F. The Unions' Proposal in the Industry Negotiations

Mr. Segal's efforts to get talks started through Mr. Parsonnet bore no fruit, at least not immediately. But at the same time, negotiations were going on between the Industry, including Kraftco, and the two Locals. On April 9, 1968, with Samuel J. Cohen, Esq., plaintiffs' counsel in this case, acting as spokesman the unions presented their proposals numbered 16 through 36.

Union proposal 34 was a proposal for the addition to the pension and welfare provisions of the Industry Agreement of a provision which would have required an employer who terminated his business to finance an "actuarial study" to determine the effect of the termination upon the Pension Fund and "to make such payment or payments to the Fund as may be found actuarily required to offset any such effect" (310a). Speaking of this proposal, Mr. Cohen said:

> "Item 34 is a very interesting proposal.
>
> You remember what we negotiated with the Swift people when they terminated their business in Brooklyn.
>
> We would like to formalize the procedure.
>
> I am not the author of this clause. Tom Parsonnet is and I am in accord.
>
> This is a non-controversial proposal for the benefit of the Funds with no gimmicks" (311a).

Kraftco's representatives Donald Mott and Ed Glynn were both present at the time, and Mr. Mott recorded in his notes

of the meeting: "[Union Proposal] (34) Sam [Mr. Cohen]: (Attempt to formalize the Swift agreement)" (313a).

Again on April 17, 1968, in a colloquy between Mr. Cohen and Aaron L. Solomon, Esq., counsel for the Industry and, with Mr. Cohen, co-counsel to the Pension Fund, the following was said with reference to union proposal 34, with Messrs. Mott and Glynn in attendance (317a).

> "Cohen: I don't see a problem. What we have in mind is something like the Swift situation where contributions are not made for the length of time contemplated.
>
> Solomon: This clause goes beyond what you've mentioned. You contemplate the continuation of contributions until an employee is eligible for retirement."

It is to be remembered that the Swift Agreement recited that it dealt with contributions in respect of the terminated Swift employees for one and three year periods (page 16, above) and that the actuarial study which Kraftco had done on April 5, 1968 differed from this Swift approach in that it assumed "the continuation of contributions until an employee is eligible for retirement".

G. The Breyer Closing Agreement

On April 23, 1968, Kraftco filed an unfair labor practice charge with the NLRB against Local 680 based upon its refusal to meet separately with Kraftco to discuss the Breyer closing. Whether because of the charge or not, a meeting between Kraftco and the unions was arranged for April 25, 1968, at the Sheraton Motor Inn in New York.

Representatives of Kraftco and the unions met at 11:45 a.m. Present for Kraftco were Messrs. Mott and Glynn

and James J. Leyden, Esq., a partner of Mr. Segal. Also present was Mr. Solomon, the Industry's counsel and spokesman. Present for the Union were Mr. Cohen and Messrs. McGinley and Clark, the Presidents of Locals 680 and 757, respectively.

The discussion began with Mr. McGinley acknowledging that Mr. Parsonnet had told him everything that Mr. Segal had told Mr. Parsonnet in their meeting on April 11 (pages 19-20, above) (152a, 321a). Then the unions, through Mr. McGinley, told Kraftco what they wanted in return for their agreement that, notwithstanding any inconsistent terms that might be contained in the new Industry Agreement, Kraftco could during the term of such new agreement cease ice cream production at Newark and transfer the distribution function to a new New Jersey location to be supplied with product from the Long Island City plant. Their requests were:

(1) Industry assurance that no other employer would discontinue operations during the term of the new Industry Agreement,

(2) an acceptance in connection with the Newark closing of union proposal 34 with regard to the Pension Fund,

(3) special severance pay for the affected employees in accordance with union proposal 35 in the Industry negotiations,

(4) Kraftco's agreement to stay open (and thus keep the employees on at Newark) for one more year, and

(5) a job preference for displaced Newark employees at Kraftco's Long Island City plant.

After hearing the unions' proposals the parties adjourned at 12:30 p.m. (151a-152a)

Due to a conflicting commitment of Mr. Cohen, the parties were unable to resume until 4:45 p.m. at which time Kraftco responded to the unions' proposals through Mr. Leyden:

(1) Kraftco would go along with whatever assurances the Industry was willing to give.

(2) Kraftco would agree to an actuarial study of the adverse effect, if any, of the Newark change and negotiate with reference thereto, or it would accept whatever was worked out with the Industry on union proposal 34.

(3) Kraftco would pay one week's severance pay for each year of service to all terminated employees with 15 or more years of service, or would accept whatever the Industry negotiated on union proposal 35.

(4) Newark production would be kept going until November 2, 1968.

(5) The displaced Newark employees would be put at the bottom of the Long Island City plant permanent seniority list.

Thus, there was essential agreement on items 1 and 5, and the parties were close on items 2, 3 and 4. (153a-156a)

At 6:30 p.m. the parties met again with Mr. Cohen speaking for the unions on the open items. The unions proposed that the Pension Fund's actuarial consultants, the Segal Company, make the necessary actuarial study, and that if it showed a loss Kraftco should pay it. They requested elimination of the limitation on the special severance pay to employees with 15 years of service, and they accepted a closing date of November 2. (316a)

The only discussion took place with reference to the severance pay provision, as to which Mr. Segal had promised Mr. Parsonnet that Kraftco would be generous (186a). Mr. McGinley (at 4:45 p.m. or 6:30 p.m.) listed for Mr. Leyden the employees who would be affected by the elimination of the 15 year qualification and explained that its elimination would involve only an additional 100 weeks of severance pay. Ultimately, Kraftco paid $86,540.68 pursuant to the severance pay provision of the Breyer Agreement (158a-159a, Defendant's Exhibit L).

At 7:15 p.m. the parties met again. Kraftco had determined to accept the unions' last position and in the interim Mr. Leyden had written a summary of the points of agreement (298a). He presented it to Mr. Cohen whose notes reflect that he said,

> ". . . this is [an] acceptable statement of principles agreed upon. If more precise language is needed we will work it out." (316a).

Mr. Leyden and Mr. Solomon signed Mr. Leyden's handwritten summary, and it was agreed that it would be distributed to the other Industry representatives at the Industry negotiations to be held the next day. The meeting concluded at 7:30 p.m.

At the meeting the next day the unions withdrew union proposal 34 in the Industry negotiations, "except as to Breyer's" (316a, 318a). The Industry negotiations were successfully concluded on or about April 30, 1968. The new Industry Agreement provided for increased contributions and contemplated that they would be used to finance increased benefits (compare 276a and 290a), but no change was made in the funding policy of the Pension Fund (243).

Mr. Solomon prepared the text of the document that ultimately became the Breyer Agreement. On May 23,

1968, Mr. Solomon sent Mr. Cohen multiple copies of the agreement (299a) which was in language somewhat different from Mr. Leyden's April 30, 1968 summary (compare 298a and 303a-304a). Mr. Cohen returned signed copies to Mr. Solomon on June 3, 1968 (300a). The Breyer Agreement, signed by Mr. Ashenbrenner on behalf of Kraftco was returned to Mr. Cohen by Mr. Solomon on June 10, 1968 (302a).

H. The Original Segal Company Actuarial Study and Judge Tyler's Opinion

By letter dated May 27, 1968, Mr. Cohen sent a copy of the unsigned Breyer Agreement to Mr. Irving McDougall of the Segal Company (327a). Mr. McDougall was not an actuary. Nevertheless, when he received the Agreement, he "took a yellow pad out and set down all of the things I could think of that we would need to make such a determination" (30a). The writings on his yellow pad became without change the text of a letter dated May 31, 1968 from Mr. McDougall to the Pension Fund office requesting the data. Copies of this letter went to Mr. Cohen and Mr. McGinley. (329a-330a)

Jack M. Elkin, a Vice President of the Segal Company and its Chief Actuary (and the man who would ultimately make the redetermination pursuant to Judge Tyler's order herein), accepted responsibility for the decision to pursue the kind of actuarial study that was made. Mr. Elkin testified on his deposition that the decision was made by him on or prior to May 31, 1968.* He recalled that he was consulted on the matter by Mr. McDougall on or prior to that date, but he could not recall whether he read the Breyer Agreement at that time or not:

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* Kraftco's deposition of the Segal Company was part of the record on the motion for summary judgment before Judge Tyler (94a). Mr. Elkin made it part of the redetermination (105a). It therefore came into evidence as part of Plaintiff's Trial Exhibit 18.

Q. So that the problem as it was conceived by you on May 31st might have been as a result of Mr. McDougall's telling you what the problem was? A. That could have been, yes, the case." (23a)

Mr. McDougall explained that after he drafted his list of data requests, he consulted someone in the actuarial department and had him review his decision with respect to the kind of data that was required. The conversation took at most 15 minutes during which the actuary probably read only one paragraph of the Agreement, looked at the yellow pad and okayed it (31a-32a).

The performance of this actuarial study was delayed pending the closing of the Newark plant. Only then would the relevant data be fixed. The plant closed as scheduled on November 2, 1968 and New Jersey distribution was moved to Edison, New Jersey. The original Segal Company study was finished on April 4, 1969 (25a, see fn., above, page 15). For reasons which have never been adequately explained, the results of the study were not released until six months later on October 9, 1969 (305a).

As thereafter described by Mr. Elkin:

> The approach taken by the Segal Company was to reconstruct the history of the Newark plant as a participant in the fund. The total contributions made by the employer with respect to Newark employees was measured against the sum of the benefits already paid and the liabilities for future benefits which the plan had incurred or would incur with respect to these employees. . . . [T]he Segal Company found that there was a contribution deficit of $978,100, and this was taken as a measure of the adverse impact of the Newark closing on the pension fund. (113a-114a)

In other words, the Segal Company calculated the present value of the Pension Fund's liability to all pensioners who were on the rolls prior to the closing and whose last job had been at Breyer-Newark plus its liability for the pensions of those retiring due to the closing, and it subtracted from that an estimate of the contributions which Kraftco had made in respect of Newark employees during its 16 year participation in the Pension Fund after deducting therefrom benefits previously paid to all pensioners whose last employer was Breyer-Newark.

When Kraftco refused to pay the sum calculated on the basis of the original Segal Company approach plaintiffs brought this suit and moved for summary judgment (36a). In an Opinion dated February 25, 1971, Judge Tyler denied the motion, vacated the Segal Company's original determination, and ordered the parties to resubmit the matter to the Segal Company for a redetermination attended by the formalities which normally accompany an arbitration proceeding (86a-95a).

Judge Tyler held that the language of the Breyer Agreement was inadvertently broad and easily susceptible to misunderstanding, and that the events surrounding its execution did not, as contended by plaintiffs, support the inference that the parties intended to confer upon the Segal Company the authority to resolve the ambiguity in the contract language (93a). He also noted the fact—borne out by the evidence at trial (pages 24-25, above)—that the portion of the Breyer Agreement dealing with the Pension Fund "was incidental to the major provision concerning severance pay" (93a), by means of which Kraftco sought to ensure that sufficient Breyer-Newark employees would stay until the actual closing (303a).

The original Segal Company determination was vacated by Judge Tyler because it reflected,

"... an egregious departure from past funding practice. Specifically, I find that a present assessment of accrued liability attributable to Kraftco's Newark employees constituted error, in that it disregarded the basic decision not to amortize the accrued liability and imposed liability unequally upon Kraftco, particularly in view of Kraftco's continued participation in the Fund through its other plants." (94a)*

He found that one could not lightly read paragraph 3 of the Breyer Agreement as an assumption by Kraftco alone of an obligation to fund a portion of the unfunded liability precisely because the agreed funding policy, unchanged by the May 1, 1968 Industry Agreement, was not to fund the unfunded liability but to let its maintenance continue as a future cost of doing business in the Industry. Nor did the closing involve any unfair shift to "other" employers of any future obligations of Kraftco; Kraftco was still a major employer in the Industry and the other employers had no greater obligation than Kraftco to pay pension costs in future years.

Judge Lumbard also criticized the original Segal Company approach for its inconsistency with non-amortization policy of the Pension Fund (243a), but he failed to realize that the criticism also applies to the alternate Segal Company approach (pages 31, 43-44, below).

I. The Alternate Segal Company Actuarial Study and Kraftco's Application to Modify

On August 27, 1973, the Segal Company, through Mr. Elkin, delivered its redetermination (100a-128a) pursuant to Judge Tyler's order (96a-99a). In it, as Judge Lumbard

* Kraftco, of course, had one plant in Long Island City and a new distribution center in Edison, New Jersey.

found (223a), Mr. Elkin conceded that the Breyer Agreement was ambiguous and that actuarial science did not provide the answer to its meaning (114a-115a, 122a).

Being foreclosed by Judge Tyler from the original approach, and unaccountably finding the Kraftco approach to be "too narrow" (123a) an interpretation of language which the court had told him was "inadvertently broad" (94a), Mr. Elkin decided upon an alternate approach, suggesting that this approach was originally Kraftco's idea (106a). Kraftco believes that the origins of the alternate approach are irrelevant unless traceable to the understandings of the parties at the time of the Breyer Agreement, but since Judge Lumbard attached significance to the contention that it was Kraftco's idea (243a-245a), that contention is dealt with below (pages 41-43). We pause here only to note that Mr. Elkin was less than candid in his discussion of its origins.

Mr. Elkin describes the alternate approach as follows:

> The Actuary first compared the annual per capita actuarial cost of the plan as of April 30, 1969 (the first valuation date following the plant closing) with what would have been the actuarial cost if the plant had not closed. The amounts arrived at are $774.71 and $766.52, respectively. Thus, according to this calculation, the effect of the closing was to increase the per capita actuarial cost by slightly more than $8 per year [$8.19]. The Actuary then determined what additional assets the fund would have had to acquire, as of the date of closing, in order that the per capita actuarial cost, after the closing would have remained at $766.52. The amount was found to be $539,300. Since these cost figures do not include the termination benefit, the Actuary determined also the additional assets required to bring the termination benefit account to

the same level, per capita, as before. That amount came to $37,400, bringing the total to $576,700. (The details entering into the calculations are set forth in Appendix 3.) (120a-121a)

It is very important to understand what Mr. Elkin is really saying and doing when he (i) reports that he "determined what additional assets the fund would have had to acquire . . . in order that the per capita actuarial cost" not increase (121a), and (ii) directs that Kraftco pay that amount into the Pension Fund (128a); he is directing Kraftco to pay part of the unfunded accrued liability of the Pension Fund. The alternate approach considers the Pension Fund as having lost a perpetual annual payment of $16,200 (the $8.19 difference in *per capita* costs, times 1,973 employees and rounded (127a-128a). Such amount would theoretically otherwise have been available to the Pension Fund out of Kraftco's Breyer-Newark contributions to help pay interest on the unfunded liability. The portion of the $576,700 payment allegedly necessary to offset this loss is $539,300. Annual interest on $539,300 at 3% (the Pension Fund's interest rate assumption) is $16,200 (rounded). Thus, Kraftco is not being asked to pay interest on a portion of the unfunded liability but to pay a portion of the liability itself. (See pages 13-15, above).

When the Segal Company redetermination was issued, Kraftco sought modification (129a-133a). It contended that, even assuming the alternate interpretation had been intended, the Segal Company had gone beyond the proper scope of its actuarial expertise in the application of that interpretation. Mr. Elkin had made it clear in other places (27a-28a, 116a) that it was immaterial as an actuarial matter whether Kraftco paid the $576,700 or otherwise arranged to pay the $16,200 per year (131a-132a). The difference is obviously material as financial matter.

Modification was also sought on the further ground that since, as Judge Lumbard later confirmed, the alternate approach views the Breyer Agreement as an undertaking by Kraftco to make up the positions that were allegedly permanently lost to the Pension Fund through the Newark closing, it was inconsistent with such interpretation for Mr. Elkin to have included *distribution* positions since only *production* was closed; distribution was not closed but transferred to Edison, New Jersey (129a-131a).

On September 20, 1973, because trial of the case was imminent, Kraftco and plaintiffs stipulated to a withdrawal of the Application without prejudice and the issues involved were reserved for trial if necessary (134a-135a).

The Opinion and Order of Judge Lumbard

Judge Lumbard held that there were only three possible approaches to the actuarial problem presented by the Breyer Agreement (223a). He found that the Segal Company's original approach was not intended by the parties because (i) it would retroactively change the parties' agreement, over the 16 year history of the Pension Fund, to pool Industry employment for pension purposes (224a, 229a, 241a), and (ii) it would involve a funding of part of the unfunded accrued liability (243a). He found no evidence that either result was intended by the parties.

Judge Lumbard found that the facts and circumstances surrounding the making of the Breyer Agreement were as above described (pages 7-26), and he agreed with Kraftco that the decision between the Kraftco approach and the alternate approach had to be made in light of the Swift Agreement because, despite plaintiffs' denial, the evidence was clear "that both sides shared the understanding that

the Swift situation provided the model for the Breyer agreement" (239a).

So reasoning, Judge Lumbard went on to hold the alternate approach more consistent with the understanding of the parties because, "Above all, no provision was made in the Breyer Agreement to rehire the employees put out of work because of the [Newark] closing." It only provided "that [such employees] would be placed at the bottom of the seniority list at Kraftco's Long Island City facility", whereas, allegedly, the Swift "agreement specifically provided for the reinstatement of the [Brooklyn] employees at Swift's Woodbridge plant." This alleged distinction was found to warrant the conclusion that in the Breyer situation the related pension contributions were "deemed to be permanently lost" while in the Swift situation "the contributions from the jobs were not permanently lost to the Fund, but only interrupted". (240a-242a) He concluded as follows:

> The court finds that the parties intended that Kraftco should make up for the positions lost to the Fund's actuarial base. Inasmuch as Kraftco's contributions per employee contained a portion to cover interest on the unfunded accrued liability, and inasmuch as it made no undertaking to rehire its Newark production employees, the loss of the Newark positions resulted in an increase in the cost per employee of maintaining the existing benefit level of the Fund. The court concludes that the amount of this loss (as of the closing), over the period it would be sustained, was to be paid by Kraftco to the Fund. (242a)

Two other alleged bases for the decision were mentioned (242a, 243a-245a), but this was manifestly the key inference with regard to the parties' intent.

Having found the alternate approach to be what the parties intended, Judge Lumbard dismissed Kraftco's objections to the Segal Company's application of the alternate approach (129a-133a) because "matters of actuarial expertise are not open to judicial review unless there has been a showing of fraud or personal misconduct (and neither has been alleged)" (245a, fn. 8).

Kraftco sought reconsideration of the Opinion and Order in a motion pursuant to F.R.Civ.P. 52(b) and 59(a) and (e) (247a-248a), but its motion was denied without opinion (249a).

ARGUMENT

The record in this case consists of stipulated documentary evidence and testimony in which there is no material conflict. As a trial court sitting without a jury, Judge Lumbard's findings may be reversed if they are clearly erroneous (*United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948)) and where, as here, they are predicated upon the interpretation of documents, and credibility of witnesses is not involved, the scope of appellate review is broader. *Orvis* v. *Higgins*, 180 F.2d 537, 539-540 (2d Cir. 1950), *cert. denied* 340 U.S. 810 (1950); *United States ex rel Lasky* v. *LaVallee*, 472 F.2d 960, 963 (2d Cir. 1973); *Luckenbach S.S. Co.* v. *United States*, 157 F.2d 250, 251 (2d Cir. 1946); *Kind* v. *Clark*, 161 F.2d 36, 46 (2d Cir. 1947), *cert. denied* 332 U.S. 808 (1947).

On this appeal, Kraftco respectfully submits that the alleged distinction between the Swift and Breyer situations is altogether illusory and Judge Lumbard's key inference totally unjustified. The other assigned reasons for his result likewise do not support it, and all the evidence is consistent with Kraftco's interpretation of the Breyer Agreement.

In the alternative, Kraftco contends the Segal Company's direction of a lump sum payment of the amount calculated under the alternate approach was not a matter of actuarial expertise, that its decision to consider distribution jobs as part of the actuarial base that was allegedly permanently lost was not a matter of actuarial expertise and was inconsistent with the intent of the parties as construed by Judge Lumbard, and that he therefore erred by not reviewing Kraftco's objections.

I.

Judge Lumbard's finding that the precedent of the Swift Agreement supported the alternate Segal Company approach was clearly erroneous. All of the evidence of the parties' intent was consistent with the Kraftco approach and much was inconsistent with the alternate approach.

A. Breyer and Swift Compared

The Breyer Agreement provided for the closing of Newark production on or after November 2, 1968, and the relocation of Newark distribution at a new New Jersey location within the jurisdiction of Local 680. Employees terminated as a result of the closing were to be placed at the end of the Long Island City seniority list (304a). Such a provision was in legal effect an offer of employment in whatever jobs were currently available or became available during the recall rights period applicable to employees under the Industry Agreement with Local 757 (289a). Any employee who might have gone to the new distribution location would have enjoyed seniority under the Industry Agreement with Local 680.

Under the Swift Agreement, the 51 employees who were laid off when Swift's Brooklyn plant closed retained their

Brooklyn seniority *inter se*, but if they took reemployment at Woodbridge their "seniority at Woodbridge [would be] subject to the seniority of any and all regular Woodbridge employees who had accumulated seniority at Woodbridge and were listed on the Woodbridge seniority list as of April 30, 1965" (325a). Thus, the Swift Agreement also put the laid-off employees "at the end of the permanent seniority list" at Woodbridge and, although executed retroactively on April 21, 1966, it placed them on the Woodbridge list as of the date of the Brooklyn closing, April 30, 1965.

Although paragraph 5 of the Swift Agreement speaks of an offer of employment at Woodbridge to the 51 employees who had been laid off a year before in Brooklyn, paragraph 8 of the Swift Agreement (326a), which is not quoted in Judge Lumbard's Opinion and Order (235a), clearly provided that such reemployment *would not be guaranteed after January 14, 1967.* Thus, anyone who accepted the offer, which was subject to acceptance up to May 28, 1966, could be sure of at most 8½ months' work at Woodbridge. After January 14, 1967, a former Brooklyn employee would continue to work at Woodbridge only if there was work to be done and his position on the Woodbridge seniority list entitled him to do it and, as indicated, the Swift Agreement put him at the end of that list and made him junior to all employees who were at Woodbridge when Brooklyn closed. The Breyer Agreement did the same thing to Newark transferees to Long Island City.

The provision of the Breyer Agreement that paralleled Swift's 8½ month reemployment commitment was Kraftco's Agreement to remain open until November 1968. It will be recalled that the unions wanted a full year (page 23, above).

From the point of view of "positions lost to the Fund's actuarial base" the Swift and Breyer situations were identical. Even assuming 100% acceptance of the Swift re-employment offer, it merely delayed by 8½ months whatever theoretically permanent loss of positions and contributions the Brooklyn closing may have caused. Thereafter, the attainment and maintenance of pre-existing employment levels at Swift, as at Breyer, would depend upon the creation of new jobs through business growth.

Further, Judge Lumbard reached the conclusion that the Swift Agreement had actually operated to raise employment to former levels without any evidence other than the document. But obviously, it could not be assumed that *any* of the Brooklyn employees who had been laid off a year earlier would decide to move to Woodbridge with a guarantee of only 8½ months' work.*

The re-employment offer in the Swift Agreement does represent a difference—as does the fact that the Breyer Agreement provided $86,540.68 in special severance pay—but it is not a difference that would support any finding that the Pension Fund was affected differently in the two situations, or a finding that the parties were thinking of the Breyer closing in terms of a permanent loss of employment. The record is to the contrary. In the Segal-Parsonnet meeting the discussion was to the effect that in the long run there might be no employment loss. (185a- 186a)

In terms of their impact on the Pension Fund, there was no essential difference between the Swift and Breyer clos-

* The only Brooklyn employees likely to accept would be those who had had seniority at Brooklyn over the 8 employees whom paragraphs 5 and 7 of the Swift Agreement reflected had earlier taken jobs at Woodbridge because, presumably, those 8 jobs would continue to exist after January 14, 1967 and the 8 most senior Brooklyn transferees would be entitled to hold them.

ings and certainly there is no evidence that the parties perceived any. But the separate agreements did contemplate a difference in approach to the way the compensating payment to the Pension Fund would be calculated. Direct evidence as to the nature of *that* difference is available in Mr. Cohen's and Mr. Solomen's colloquy regarding proposal 34. Mr. Cohen said:

> What we have in mind is something like the Swift situation where contributions are not made for the length of time contemplated. (317a)

Clearly, on April 17, 1968, more than a year after the Swift Agreement was fully performed, Mr. Cohen did not think of the Swift closing as having involved only an interruption of contributions. Mr. Solomon's rejoinder stated the difference in intent:

> This clause goes beyond what you've mentioned. You contemplate the continuation of contributions until an employee is eligible for retirement. (*id.*)

This is the Kraftco approach.*

B. Exhibit R, For Identification

There is no question that Kraftco intended the Kraftco approach. This is the approach reflected by Exhibit R which was marked for identification but not received in evidence (333a). It was not received because, although Mr. Segal told Mr. Parsonnet that Kraftco had made "a preliminary investigation of the effect" and based thereon

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* Judge Lumbard appeared to say at one point that the Kraftco approach deals only with contributions in respect of its new retirees (241a-242a). The approach takes into account contributions in respect of *all* terminated employees, whether or not they were eligible to retire upon the closing, and it involves "the continuation of contributions until [each] employee [would have been] eligible for retirement" (above, pages 17-19).

was "convinced if anything [the closing] would be a benefit to the plan" (186a-187a), he had not shown him Exhibit R.

The only way that the alternate approach can be justified is through evidence that Kraftco had one intent but communicated another. But Mr. Segal said enough to rule out for Mr. Parsonnet the possibility that Kraftco was thinking in terms of the alternate approach. Mr. Segal told him Kraftco did not look upon an orderly, negotiated closing as necessarily involving a permanent reduction in Local 680 membership. He also indicated that the actuarial study Kraftco had had performed focused on the particular employees who would be laid off and implied that the adverse effect, if any, was a function of the age and service characteristics of those employees. He said nothing that would lead anyone to conclude that the study he had in mind had anything to do with the Pension Fund's interest payments on its unfunded liability into the indefinite future.

Although he refused to receive Exhibit R, Judge Lumbard considered and relied upon it in his Opinion and Order:

> Further evidence adduced at trial confirms that this was the intent of the parties. While it is true, as previously mentioned, that the Breyer agreement itself was not reviewed by an actuarial consultant either during its negotiation or prior to its final signing, an actuarial study dated "4/5/68" had been done for Kraftco by Peat, Marwick, Mitchell & Company outlining the savings of the closing relative to pension and welfare costs. This study of the "Breyer Ice Cream Division—Newark Plan * * * as of May 1, 1968," indicated that the company's "Estimated termination liabilities * * * For Retirement Benefits" was $422,000, and it contrasted this liability with the "Estimated costs on a continuing basis [of] Past Service Liability"

> of $714,000. Thus the company's own estimates, even though they reflected a net saving of $292,000 in pension costs, predicated a liability for pension benefits on closing in an amount close to the Segal company's alternate approach figure of $576,700. (242a)

Whether or not it is fair to say that the $422,000 estimate* made by Peat, Marwick months before the closing was close to $576,700, there is no pertinent link between the two items whose present values they purport to reflect. The estimated termination liabilities amount was the estimated value of the benefits due to the Newark employees eligible to retire (333a); the alternate approach figure represents an amount which at 3% interest would reduce the annual interest burden by $16,200 (pages 30-31, above).

Apparently Judge Lumbard referred to the similarity he found between these two numbers because he felt it showed that Kraftco was really "thinking" that its "liability" was somewhere in that numerical neighborhood. But what Exhibit R really showed was that Kraftco was "thinking" of a particular type of actuarial study and, when the precise data became available, it was willing to pay whatever amount such a study would show. That amount is $134,100.

If it were not possible to resolve the ambiguity in the Breyer Agreement by objective evidence, Kraftco's subjective intent is established by Exhibit R. Since the plaintiffs put on no evidence as to their subjective intent, there would be no basis in law for granting judgment on anything other than Kraftco's understanding. (RESTATEMENT OF CONTRACTS, § 71). Whether or not the objective evidence is sufficient, if Judge Lumbard decided to consider the Peat,

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* In its application of the Kraftco actuarial approach, the Segal Company calculated that this item had a present value of $787,900 (126a).

Marwick study for its implications as to what Kraftco was "thinking" he should have considered it as a whole and accepted its full implications.

C. The Bassett Evidence

The third and final matter on which Judge Lumbard relied to support the alternate approach was a quotation from the affidavit which Kraftco's actuarial expert, Preston C. Bassett, filed in opposition to plaintiffs' motion for summary judgment. In demonstrating that the language of the Breyer Agreement was ambiguous, Mr. Bassett contrasted the Segal Company's original approach with the type of actuarial study which Mr. Elkin, in his deposition, said he would have made in response to language in the Trust Agreement authorizing the addition of non-Industry employers if their addition would "not adversely affect the soundness of the Fund as determined by the Fund's Actuaries" (243a). He described two studies, including the so-called alternate actuarial study (25a-27a). Mr. Bassett said he found no justification as an actuarial matter for Mr. Elkin's varying interpretations:

> "In the absence of evidence that the parties intended such a result, I can see no basis for considering such similar language in the Breyer Agreement in so different a fashion." (80a)

In the balance of the affidavit (80a-83a) Mr. Bassett concludes that the proper approach appeared to be the Kraftco approach. Therefore, far from supporting the reasonableness of the alternate approach Mr. Bassett's affidavit supports only the Kraftco approach.

Judge Lumbard's misplaced reliance on the Bassett affidavit may well have been inspired by Mr. Elkin's suggestion in the redetermination that Mr. Bassett was the source of Mr. Elkin's decision to apply the alternate approach to

an employer who was leaving rather than entering the Pension Fund. Mr. Elkin said:

> In short, [my] deposition stated that one way of measuring the possible adverse effect of a new employer's entrance into the plan would be to determine the amount, if any, by which the actuarially required rate of contribution is increased as a result. The Defendant suggested that a similar approach could have been taken to the Breyer closing. In other words, there is a clear suggestion here that the Segal Company could have determined the actuarial cost of the plan immediately before and then immediately after the closing and used the difference between the two determinations to demonstrate the impact of the closing.

Mr. Elkin's distinctly partisan effort to pin the rose on Mr. Bassett and Kraftco is misleading. The record shows that on October 10, 1969, the day after the original Segal determination was issued, the Segal Company issued an actuarial study of the closing of a Borden plant which was done by the alternate method (19a, 28a, 34a-35a).

Whether or not Judge Lumbard was affected by Mr. Elkin's effort to avoid the Kraftco approach, Mr. Bassett cannot be used for this purpose. At trial, with reference to the exchange between Mr. Cohen and Mr. Solomon on April 17, 1968 (pages 21-22 above), Mr. Bassett was asked:

> Q. If you were told, in addition, that what the parties had in mind is the situation where contributions are not made for the length of time contemplated, and where we contemplate the continuation of contributions until an employee is eligible for retirement, which among the three Segal determinations' choices

would you follow, and would it be compelled under the circumstances as a matter of actuarial art?

He gave this answer:

> A. The answer to the question is that if the parties instructed the actuary to determine the impact on the fund, of the withdrawal of these specific employees, and only with regard to these employees, then to me the only answer is the Kraftco approach. The alternate approach contemplates really the loss of the jobs in perpetuity, into the future. It is not concerned with the employees but the loss of positions and they go on forever.
>
> When you talk about the employees who were terminated, then you get down to the Kraftco approach.

D. The Other Evidence

Judge Lumbard rejected the original Segal approach because it interpreted the Breyer Agreement as forfeiting the relative cost advantage to Kraftco due to the original agreement of the Industry and the unions to pool employee experience (224a, 229a, 241a). However, he cites an additional reason for rejecting that approach:

> Furthermore, in the area-wide collective bargaining agreement of May 1, 1968, in which representatives of the Segal company had participated, no change was made in the funding policy of the Fund. Interest would continue to be paid on the unfunded accrued liability and no amortization of the liability was contemplated.
>
> This result would have been inconsistent with the Segal company's original approach. Had that approach been the one intended by the parties, its effect would have been either to fund part of the unfunded accrued

> liability, or to increase the benefits payable under the plan without any other compensating adjustment, or to reduce the Fund participants' costs per employee, or some combination of these. But neither the April area-wide negotiations nor the May 1st agreement give any indication that the industry and union representatives present, aware as they were of the Breyer agreement, or the representatives of the Segal company had any such result in mind. Their actions, rather, are consistent with the assumption that the Breyer agreement would preserve the status quo of the Fund, an assumption confirmed by the ensuing annual actuarial review of the Fund prepared by the Segal company. (243a)

As pointed out above (pages 31-32), the alternate approach also effects a funding of part of the unfunded accrued liability. Therefore, the argument applies with like force to that approach. As Mr. Elkin explains in the redetermination, there is no difference between the original and alternate approaches except that the original approach undid the effects of the Industry agreement to pool employees for pension purposes:

> ". . ., [I]f Kraftco had been an everage employer, with the same experience as to turnover, mortality, retirement, etc. as the fund as a whole, the amount determined by the original Segal calculation would have been precisely the amount now determined by the third approach". (122a, fn.)

Accordingly, the alternate approach is also inconsistent with the parties' basic agreement not to amortize the unfunded liability.

Finally, Judge Lumbard found that in the parties' minds paragraph 3 of the Breyer Agreement and union proposal

34 in the Industry negotiations were equivalent (232a-233a, 235a-237a). If proposal 34 were given the alternate interpretation and if it had been incorporated in the Industry Agreement, it would have stood as a guarantee by the Industry of the unfunded past service liability of the Pension Fund. This is obviously so since, as applied to Kraftco, the Segal Company calculated Kraftco's Breyer-Newark "share" of the unfunded liability and directed Kraftco to pay it. If all employers made such an undertaking, all the liability would have been guaranteed.

This could not have been the unions' understanding of proposal 34 because Mr. Cohen described it as a "non-controversial proposal . . . with no gimmicks." If it were intended by the unions to operate as a guarantee of the unfunded liability of the Pension Fund, a guarantee that had never been made, it could not have been honestly described as "non-controversial" and free of "gimmicks".

II.

Judge Lumbard committed error in refusing to hear Kraftco's request for modification of the Segal Company's application of the alternate approach.

Judge Tyler held that in the circumstances a court had the power to review the Segal Company's determination pursuant to the Breyer Agreement for reasonable correctness and to determine whether the correct evaluative formula had been followed.

Judge Lumbard's finding was no different. He held that while "matters of actuarial expertise are not open to judicial review," there is power to review if the court is "persuaded that the actuary used a method of evaluation inconsistent with the Breyer agreement or beyond the

scope of the agreement". (245a, fn. 8) But Judge Lumbard held that against that standard Kraftco's objections could not be reviewed.

Kraftco respectfully submits that Judge Lumbard was incorrect. Kraftco's first request was that any payment by it to the Pension Fund under the alternate method be arranged so as to permit Kraftco to take advantage of the current cost of money. The essence of the Segal Company's determination is that each year into the future the Fund will be short $16,200 by virtue of the Newark closing. There are much cheaper ways for Kraftco to finance that kind of obligation than to deposit a principal sum at 3% interest.

As Mr. Elkin has stated, how the obligation is handled is of no actuarial concern. On Mr. Elkin's deposition he made the point in the following way:

> [151] Q. You calculated a sum to fully fund past service liability in respect of Breyer employees and then made it generally available to the rest of the fund? A. I didn't make it generally available—
>
> Q. I am talking theoretically. In other words, if paid in it would be made available to the rest of the fund? A. Theoretically it would be part of the fund, yes.
>
> It would be fully consistent with an actuary's approach to this if the million dollars were paid in in installments.
>
> The actuary is only concerned with the present value of the deficit in the fund resulting from an employer's termination. The actuary then comes up with a lump sum payment. If the parties want to have some other arrangement about meeting that obligation, that's not the actuary's concern.

The same position is echoed in the redetermination with reference to the original Segal calculation (116a), but it is equally applicable to any lump sum payment calculated under the alternate approach. Kraftco's first request, therefore, does not go to a matter of actuarial expertise, and it is quite beyond the scope of the Breyer Agreement to bind Kraftco to a lump sum payment which is not actuarially required.

Kraftco's application to modify Mr. Elkin's redetermination also requested that he recalculate by the alternate method after eliminating from the data 10 *distribution* jobs, because under the alternate method only lost *production* positions were relevant (131a).

As described by Judge Lumbard, the alternate method involves the assumption that Kraftco agreed to make up the actuarially determined effect upon the Pension Fund resulting from the theoretically permanent loss of positions due to the termination of the operation involved (242a). Assuming this were the correct interpretation of the Breyer Agreement, the only operation which was terminated was the *production* operation; the *distribution* function was merely relocated and the "positions" associated with that operation were not lost but continued in the new Edison, New Jersey, location.

Accordingly, it was error for Mr. Elkin to include the 10 positions which Kraftco identified as distribution positions (131a). The error is clearly not actuarial; rather it goes to the question of Mr. Elkin's consistency with the intent of the parties as construed by the Court.

CONCLUSION

The judgment entered pursuant to Judge Lumbard's Opinion and Order should be amended to award plaintiffs judgment in the principal amount of $134,100 with interest thereon at the rates stipulated in footnote 9 to Judge Lumbard's Opinion and Order (246a), and, as so amended, the judgment ought to be affirmed. In the alternative, the judgment should be vacated and the case remanded to the District Court for new trial with respect to the issues raised by Kraftco's application to modify redetermination of the Segal Company (129a-133a).

Respectfully submitted,

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July 9, 1974

Service of two copies of the within brief is hereby acknowledged this 9th day of July, 1974

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